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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 40.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

CAPITAL TRANSIT COMPANY, ET AL., *Appellees*.

MEMORANDUM IN SUPPORT OF PETITIONS FOR REHEARING.

Submitted on Behalf of the State Corporation Commission of the State of Virginia and the National Association of Railroad and Utilities Commissioners, Amici Curiae.

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November 29, 1949.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable Supreme Court of the United States:

Come now the State Corporation Commission of the State of Virginia and the National Association of Railroad and Utilities Commissioners, amici curiae, and present this memorandum in support of the petitions for rehearing pre-

sented by the Appellees in the above-entitled cause, and, in support thereof, respectfully show:

1. The Court should rehear and reexamine the question of the Commission's jurisdiction under the proviso in Section 216(e), denying the Commission jurisdiction to regulate in any manner the rates for intrastate motor carrier transportation for any purpose whatever. The per curiam opinion of November 14, 1949 states that the contention, that Section 216(e) precluded Commission jurisdiction, was presented and rejected in *United States* v. *Capital Transit Co.*, 325 U. S. 357. The holding in the former Capital Transit decision, that Capital Transit's operations constituted "interstate transportation" and thus the Section 216(e) exemption was necessarily inapplicable, is not controlling or applicable in the present case as material operational changes have occurred since the former decision was rendered. The discontinuance, by Capital Transit, of physical operations into Virginia, subsequent to the former decision and prior to the present decision, undercuts any foreordaining of the inapplicability of the Section 216(e) exemption. The statutory limitation, under Section 216(e), on the Commission's authority to prescribe rates applicable to Capital Transit intra-District carriage of passengers was not under consideration in the former decision.

Whether the Section 216(e) exemption is inapplicable in the present case must be based on the existing operations of Capital Transit. The Court's opinion refers to these present operations as "Transit's intra-District streetcar and bus transportation of passengers". This intra-District transportation comes within the Section 216(e) exemption applicable to "intrastate transportation".

2. Congress did not assume to occupy the entire and exclusive field of transportation by motor carrier when it enacted the Motor Carrier Act of 1935. We refer the Court to our brief in this case, pages 8 to 14. Assuming, *arguendo*, that Transit's intra-District transportation is a part

of an interstate movement, as held in the Court's opinion, nevertheless the exemption in Section 216(e) is still applicable. The Commission is without authority to prescribe rates for intra-District transportation "for the purpose of removing discrimination against interstate commerce or for any other purpose whatever". The transportation service furnished by Capital Transit is intra-District, and even though a part of an interstate trip, remains outside the Commission's power.

3. Congress did not intend to give the Commission any such broad and sweeping powers as are attempting to be exercised here. Such operations as are carried on by Capital Transit are primarily local in character, and are subject to the full application of the *Cooley* doctrine. The fact is that Section 203(a)(13) of the Act, defining the term "motor vehicle", expressly excludes street cars from its provisions. It even excludes trolley buses "furnishing local passenger transportation similar to street railway service". By Section 203(b)(8), other local transportation, though interstate, is precluded from Commission jurisdiction. It is apparent that Congress did not exercise its plenary powers under the Commerce Clause.

This Court has stated that the statutory authority upon which the federal exercise of jurisdiction is based must appear affirmatively and not rest upon inference alone, and that words denying the application of an act shall plainly mean that the act shall not apply. *Connecticut Light and Power Co.* v. *F. P. C.*, 324 U. S. 515. Here, Congress has specifically exempted intrastate transportation from Commission jurisdiction and that denial of jurisdiction can not be read to confer jurisdiction.

4. While the proceeding involves only the local fares in a single community, the Court's ruling upon the jurisdictional question will establish precedents which will be national in scope. If the Commission's assertion of jurisdiction is sustained, not only will local transportation through-

out the nation become susceptible to Commission authority, but also local streetcar operations which Congress specifically exempted from Commission regulation. This Court aptly summarized the correct view in *Pennsylvania R. Co. v. Public Utilities Commission*, 298 U. S. 170, when it said:

> "If the concept of transportation is in need of expansion it is for the legislative department of the Government to determine how great the change shall be."

Conclusion.

It is respectfully urged that the petitions for rehearing be granted, and that the decree of the United States District Court for the District of Columbia be, upon further consideration, affirmed.

Respectfully submitted,

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AUSTIN L. ROBERTS, JR.,
Attorneys for National Association of Railroad and Utilities Commissioners.

Certificate of Counsel.

We, attorneys for the State Corporation Commission of the State of Virginia and the National Association of Railroad and Utilities Commissioners, amici curiae, do hereby certify that the foregoing memoranda in support of petitions for rehearing in this cause is presented in good faith, and not for delay.

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